## DATO' ABD HALIM ALI & ANOR v. SUN MEDIA CORPORATION SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID J
[CIVIL SUIT NO: S23-117-2009]
9 JANUARY 2015

***TORT:*** *Defamation – Libel – Newspaper article – Determination of natural and ordinary meaning of alleged defamatory words – Whether words complained of referred to plaintiffs – Whether impugned articles in their natural and ordinary sense carry defamatory imputations*

***TORT:*** *Defamation – Defences – Fair comment and qualified privilege – Defeating defence – Existence of malice – Whether malice defeats defence*

***CIVIL PROCEDURE:*** *Pleadings – Defamation – Defects in pleading – Striking out – Failure to state specific words complained of alleged to be defamatory – Whether pleaded case embarrassing and defective – Whether failure to specify which parts of impugned article were defamatory would render pleading as defective and liable to be struck out*

***EVIDENCE:*** *Burden of proof – Defamation – Proving actual or express malice – Whether onus in proving on person who asserts existence of actual or express malice – Whether plaintiffs must establish that defendants were actuated by dominant desire to injure plaintiffs*

The plaintiffs' action against the defendants was for the tort of defamation (libel) over three articles authored by the second defendant and published in the Sun Newspaper dated 12 November 2009 and 13 November 2009 respectively and in the internet *via* website www.sun2surf.com dated 12 November 2009 owned by the first defendant ('the impugned articles'). It was the plaintiffs' contention that the words in the impugned articles which were falsely and/or maliciously written by the second defendant and/or published, printed and circulated by the first defendant and which were accessible to members of the public referred to the plaintiffs. The plaintiffs alleged that the publication of the impugned articles had scandalised the plaintiffs in Malaysia and outside the country with hatred, contempt or ridicule and suspicion which caused aggravated damages to their reputation and lost. At the outset, the defendants raised two preliminary issues *ie*, namely on, (i) the plaintiffs failure to refer to the specific words in the impugned article that were defamatory to the plaintiffs; and (ii) the plaintiffs' failure to file and serve a reply setting out facts and matters from which malice was to be inferred pursuant to O. 78 r. 3 of the Rules of the High Court 1980 to negate the defence of qualified privilege relied by the defendants. On the other hand, the defendants pleaded defence of qualified privilege and fair comments.

**Held (dismissing claim with costs):**

**(1)** The plaintiffs should have specified which parts of those articles or statements were said to be defamatory. There were many words or sentences or paragraphs reported in the impugned articles and some might not be related or could be inferred as not reference to the plaintiffs, or alleged to be defamatory. It was necessary for the plaintiffs, even when they relied only on the natural and ordinary meaning of the words, to plead an innuendo setting out what they said was the natural and ordinary meaning of the words. (para 48)

**(2)** The plaintiffs' pleaded case was embarrassing and defective. Accordingly, if the impugned articles were ambiguous, and capable of being interpreted in a way that was not defamatory, the non-defamatory interpretation was to be preferred. The plaintiffs having only pleaded the natural and ordinary meaning, were confined to the meanings in para. 27(a) until (y) of the amended statement of claim. They could not allege a new defamatory meaning. The failure to specify which parts of those articles were said to be defamatory would render the pleading as defective and liable to be struck out. (paras 52, 53 & 54)

**(3)** In order to establish express malice sufficient to defeat a defence of fair comment or qualified privilege, the plaintiffs must establish that the defendants were actuated by a dominant desire to injure the plaintiffs. Order 78 r. 3(3) of the RHC clearly stated that if the defendants pleaded that any of those words or matters were fair comment or a matter of public interest or were published upon a privileged occasion and the plaintiff intended to allege that the defendants was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice was to be inferred. (paras 64 & 66)

**(4)** The requirement of filing and serving a reply setting out facts and matters from which malice is to be inferred to destroy a defence of qualified privilege raised is a mandatory requirement under O. 78 r. 3(3) of the Rules of Court 2012 which the plaintiffs failed to comply with. In the result, the plaintiffs had failed to successfully invoke malice to negate the defence of qualified privilege relied on by the defendants, and the said defence should therefore prevail. The issue of 'malice' was therefore a non-starter. (paras 74 & 83)

**(5)** The defence of qualified privilege is qualified as its name suggests, and ordinarily can be destroyed if the plaintiffs able to were evidence that the defendants were motivated by express malice in publishing the words complained of. The onus in proving actual or express malice lies with the plaintiffs. (para 77)

**(6)** The ordinary man, on reading those words in the context of the impugned articles, would understand that the impugned articles criticised government procurement procedures *ie*, the rationale and manner in which the 2006 contract was awarded. It did not criticise or discredit the plaintiffs. Those words in the impugned articles did not in their natural and ordinary sense carry the meanings pleaded by the plaintiffs in para. 27(a) to (y) of the amended statement of claim and were not defamatory of the plaintiffs. (paras 111 & 112)

**Case(s) referred to:**

*Abdul Rahman Talib v. Seenivasagam & Anor [1966] 1 LNS 5* ***(refd)***

*Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC* ***(refd)***

*Chew Peng Cheng v. Anthony Teo Tiao Gin [2008] 8 CLJ 418 HC* ***(refd)***

*Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA* ***(refd)***

*Dato Annas Khatib Jaafar v. Datuk Manja Ismail & Ors [2011] 1 LNS 167 HC* ***(refd)***

*Dato' Kanagalingam v. David Samuels & Ors [2006] 3 CLJ 909 HC* ***(refd)***

*Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor [2010] 5 CLJ 301 HC* ***(refd)***

*Dato' Wan Hashim Wan Daud v. Mazlan Ibrahim & Anor [1997] 5 CLJ 140 HC* ***(refd)***

*DDSA Pharmaceuticals Ltd v. Times Newspapers Ltd and Another [1972] 3 All ER 417* ***(refd)***

*English and Scottish Co-Operative Properties Mortgage and Investment Society, Limited v. Odhams Press, Limited [1940] 1 KB 440* ***(refd)***

*Horrocks v. Lowe [1974] 1 All ER 662* ***(refd)***

*Hussin Mohd Ali v. Ho Kay Tat & Anor [2004] 2 CLJ 407 HC* ***(refd)***

*Irene Fernandez v. Utusan Melayu (M) Sdn Bhd & Anor [2008] 2 CLJ 814 HC* ***(refd)***

*Ismail Shamsudin v. Abdul Aziz Abdan [2007] 8 CLJ 65*

*Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC* ***(refd)***

*Lee Kuan Yew v. Chin Vui Khen & Anor [1989] 1 LNS 190 HC* ***(refd)***

*Lim Chee Kuo v. The Pacific Bank Bhd [1999] 1 CLJ 270 HC* ***(refd)***

*Lim Guan Eng v. Utusan Melayu (M) Bhd [2012] 2 CLJ 619 HC* ***(refd)***

*Lim Kit Siang v. Datuk Dr Ling Liong Sik & Ors [1996] 1 LNS 106 HC* ***(refd)***

*Loutchansky v. Times Newspapers Ltd And Others [2001] 4 All ER 115* ***(refd)***

*M Prabhakaran v. Salam Seran [2001] 3 CLJ 615 HC* ***(refd)***

*Microsoft Corp v. SM Summit Holdings Ltd [1999] 3 SLR(R) 493* ***(refd)***

*Miller v. Associated Newspapers Ltd [2003] EWHC 2799 QB* ***(refd)***

*Rackham v. Sandy [2005] EWHC 482 (QB)* ***(refd)***

*Reynolds v. Times Newspapers Ltd [2001] 2 AC 127* ***(refd)***

*Roberts v. Bass [2002] HCA 57* ***(refd)***

*S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC* ***(refd)***

*Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd [2010] 7 CLJ 885 HC* ***(refd)***

*Slim And Others v. Daily Telegraph, Ltd & Anor [1968] 1 All ER 497* ***(refd)***

*Soh Chun Seng v. CTOS - EMR Sdn Bhd [2004] 5 CLJ 46 HC* ***(refd)***

*Subramaniam Paramasivam v. Courts Mammoth Bhd & Anor [2011] 10 CLJ 739 HC* ***(refd)***

A *Tan Sri Dato' Tan Kok Ping, JP lwn. The New Straits Times Press (Malaysia) Bhd & Yang Lain [2010] 3 CLJ 614 HC* ***(refd)***

*Tony Pua Kiam Wee lwn. Syarikat Bekalan Air Selangor Sdn Bhd [2013] 1 LNS 1433 CA* ***(refd)***

*Turner (Otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures Ltd [1950] 1 All ER 449* ***(refd)***

B *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors [2003] 6 CLJ 559 HC* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 78 r. 3(1), (2), (3)

Rules of Court 2012, O. 78 r. 3(1), (2), (3)

C **Other source(s) referred to:**

*Atkin's Encyclopedia of Court Forms in Civil Proceedings,* 2nd edn, vol 25, 1998 Issue pp 196 - 197, Form 83

Lorraine Cheah, *Defamation Handbook (MLJ Handbook Series)*, pp 158 - 159, Form 541 (B)

Price & Duodu, *Defamation Law, Procedure & Practice*, para 2.06, p 125

D *For the plaintiffs - Mohd Yusof Zainal Abiden (Kamarul Hisham Kamaruddin & Lim Kon Keen with him); M/s The Chambers of Kamarul Hisham & Hasnal Rezua*

*For the 1st & 2nd defendants - Nitin Nadkarni (Himahlini Ramalingam & Mak Hon Pan with him); M/s Lee Hishammuddin Allen & Gledhill*

*Reported by Thirunavakarasu Vijayan*

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## JUDGMENT

**Kamaludin Md Said J:**

**Introduction**

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**[1]** The plaintiffs' action against the defendants in their amended statement of claim is premised on tort of defamation. It stems out from the three reports and/or articles authored by the second defendant and published in the SUN Newspaper dated 12 November 2009 and 13 November 2009 respectively, and in the internet *via* website www.sun2surf.com dated 12 November 2009 owns by the first defendant.

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**[2]** The three reports are reproduced below:

The 1st Report

'RM32m deal nipped

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KL MAYOR CANCELS THREE YEAR CONTRACT FOR FRESH FLOWERS

By Terence Fernandez

sreports@thesundaily.com

I

KUALA LUMPUR: The mayor has nipped in the bud a RM32.4 million three year contract to supply flowers.

The deal, signed by Federal Territories Ministry officials under the tenure of former mayor Datuk Abdul Hakim Borhan, would have cost rate-payers RM900,000 a month.

The flowers and plants are for Kuala Lumpur City Hall (DBKL)'s new tower on Jalan Raja Abdullah. DBKL sources say the flowers, delivered every week, adorned the entrances to the building as well as the offices of several senior officials, including that of the FT Minister.

"The cancellation of the contract is part of the mayor's efforts to right wrongs and questionable decisions and policies of previous administrations. Also, as times are bad, the DBKL needs to focus its limited resources on more important issues", said the source.

When contacted, Mayor Datuk Ahmad Fuad Ismail confirmed that he revoked the contract last month.

I felt it was a total waste of funds to throw such money on such extravagance, especially during current lean times. When the deal was struck, I think they did not consider the capacity of DBKL to pay," he said, adding that records showed the original pricing was RM1.5 million a month before it was negotiated downwards. He declined to reveal more details.

Ahmad Fuad, who was Housing and Local Government Ministry Secretary General, has been tasked by Chief Secretary to the Government Tan Sri Mohd Sidek Hassan to find a suitable candidate to replace Abdul Hakim last year, following numerous complaints from city folk on poor services and chaotic traffic management, coupled with an increase in assessment.

It was only after Kuala Lumpur voters elected Pakatan Rakyat MPs to all but one of the 12 Federal Territory's constituencies was the magnitude of the people's disgust and anger brought home. Following the election results, it was decided that Ahmad Fuad was the best man for the job and he became the city's ninth mayor on December 15 last year.

However, criticisms have been as such that instead of running the city and improving services, he is unable to focus on the job at hand as he tries to clean up the mess left behind by previous administrations - both at DBKL and the FT Ministry levels.

These include poring over questionable agreements such as the flower supply deal as well as the procurement of vehicles and maintenance and the relocation of squatters.

As the Commissioner of Buildings, Ahmad Fuad also oversees as common property maintenance of high rises.

The 2nd Report

'KL Mayor cancels RM32 million flower contract

Terence Fernandez

A KUALA LUMPUR (Nov 11, 2009): City Mayor Datuk Ahmad Fuad Ismail has cancelled a three-year RM32.4 million contract for flowers

The supplier here would have cost rate-payers RM900,000 a month. The flowers and plants, according to sources, include those with short life spans are for Kuala Lumpur City Hall (DBKL)'s new tower on Jalan Raja
B Abdullah. The deal was signed by Federal Territories Ministry officials under the tenure of Ahmad Fuad's predecessor Datuk Abdul Hakim Borhan. DBKL sources say the flowers, delivered every week, adorned the entrances of the City Hall building as well as the offices of several senior officials, including that of the Federal Territories Minister.

C "The cancellation of the flower contract is part of the mayor's efforts to right wrongs and questionable decisions and policies of previous administrations. Also, as times are bad, the DBKL needs to focus its limited resources on more important issues", said the source.

When contacted Ahmad Fuad said he revoked the contract last month.

D "I felt it was a total waste of funds to throw money on such extravagances, especially during current lean times. When the deal was struck, I think they did not consider the capacity of DBKL to pay." he said, adding that records showed the original pricing was RM1.5 million a month before it was negotiated downwards.

E He declined to reveal more details, but sources said the company concerned is Ampang based Bright Spark Sdn. Bhd.

An online search on the Companies Commission of Malaysia drew no results.

Ahmad Fuad, who was Housing and Local Government Ministry
F secretary general, had been tasked by the Chief Secretary to the Government Tan Sri Mohd Sidek Hassan to find a suitable candidate to replace Abdul Hakim last year, following numerous complaints from city folk on poor services and chaotic traffic management, coupled with an increase in assessment.

G It was only after Kuala Lumpur voters elected 11 Pakatan Rakyat MP's in the Federal Territory's 12 - constituencies was the magnitude of the people's disgust and anger brought home.

Following the election results, it was decided that Ahmad Fuad was the best man for the job and he became the city's ninth mayor on Dec 15, 2008.

H However, criticisms has been as such that instead of running the city and improving services, the current mayor is unable to focus on the same job at hand as he tries to clean up the mess left behind by previous administrations - both at DBKL and the Federal Territories Ministry levels.

I These include poring over questionable agreements such as the flower supply deal as well as the procurement of vehicles and maintenance and the relocation of squatters.

As the Commissioner of Buildings, Ahmad Fuad also oversees strata issues and building management matters such as common property maintenance of high rise.

The 3rdReport

'Down2Earth

By Terence Fernandez

MACC should follow the stink

SOMETHING stinks in Kuala Lumpur City Hall (DBKL) and it is more than just the withering flowers - all RM900,000 of them which have been making two companies rich over the past year.

It is not one's intention to throw sand into the rice bowls of Syarikat Mulia and Brightmark Sdn. Bhd. As profit oriented businesses, one cannot blame them for humping on such a rosy deal that would bring them in excess of RM32 million in three years.

Only issue is it is public money that is going towards filling the pockets of those behind this venture. They include two Datuk - one Abd Halim Ali whose name appears in Syarikat Mulia's records as sole proprietor and the other whose name does not appear anywhere but is mentioned in the corridors of City Hall and the Federal Territories and Urban Well-being Ministry.

Companies Commission of Malaysia records reveal Brightmark's directors as Roslan Ab Karim and Mustaza Selamat who are also shareholders with 64,998 and 585,002 shares respectively.

Again my quarrel is not so much with the businessmen, but what was running through the minds of the guardians of our coffers when they approved such extravagance for plants? Were they thinking at all? Or were they putting individual interests over the public interest?

All I can say is thank goodness that for a change we have a civil servant who is willing to stand up to questionable decisions and abuse of the public trust. Instead of repeating the now state mantra of "this was before my time", Mayor Datuk Ahmad Fuad Ismail made the difficult decision to act in favour of the rakyat instead of political masters.

He deserves praise for putting his neck out and nipping the contract in the bud, so to speak.

Ahmad Fuad would have stepped on many toes in saving the people' money. After all, from what I gather, the contract was "awarded" without a tender being called by the Federal Territories and Urban Wellbeing Ministry, committing DBKL which had to foot the bill.

When I spoke to Ahmad Fuad, he sounded understandably worried. After all, he would have pissed off many political masters and their cronies, who in turn may try to exact revenge by using their influence to send him to the "pool" in layman's terms, transferred to a dead end job until this retirement.

A After all, it has come to my knowledge that there are at least three senior officials who were sent to "Siberia" as they could not get along with their minsters. Hence it is incumbent on the civil service led by Chief Secretary to the Government Tan Sri Mohd Sidek Hassan to protect one of its own. Mohd Sidek, after all had often said that civil servants must stand up to politicians if they feel the latter are doing something wrong.

B Ahmad Fuad must not be made to pay the price for standing by his principles and doing right by the people. After all, wasn't he sent to DBKL to clean it up? You don't penalise a man for doing his job.

In the same vein the prime minister too, who emphasises on "performance now", must ensure that public servants like Ahmad Fuad are allowed the C freedom to do their jobs.

Datuk Seri Mohd Najib Razak must ensure that the vultures that have infiltrated public offices are removed and kept at bay. He must haul up and remove ministers who not only do not perform but also try to use their influence and power to gain favours for themselves and their D minions.

It is laudable that Federal Territories and Urban Wellbeing Minister Datuk Raja Nong Chik Raja Zainal Abidin is behind Ahmad Fuad on this and allowed the contract to be cancelled. After all, it is not just Ahmad Fuad who wants DBKL to start on a clean slate. The Federal Territories E and Urban Wellbeing Ministry too under Raja Nong Chik's predecessors had been accused of usurping the duties of the mayor and running the city like a sendirian berhad.

In the case of the RM32 million flowers, it is a wonder how the auditor general missed this.

F Shouldn't the Malaysian Anti-Corruption Agency be interested in this deal? After all, it does conduct investigations based on news reports. Ahmad Fuad has made the first step to right a wrong; it is now up to others to take it the rest of the way.

Terence feels all's not lost when there are still civil servants with the G backbone to say "No" to the abuse of the public trust. He is deputy editor special reports & investigations and can be reached at terence@thesundaily.com and followed on Twitter@TerencetheSUN.

**[3]** The first report, second report and third report are marked as exh. "P3", exh. "P4" and exh. "P5" respectively (hereinafter jointly referred H to as "the impugned articles").

**[4]** The plaintiffs claim that words in English in the impugned articles which are falsely and/or maliciously written by the second defendant and/or published, printed and circulated by the first defendant refer to the plaintiffs.

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**[5]** At para. 27 of the statement of claim, the plaintiffs alleged that the words contain in the impugned articles collectively and/or independently in their natural and/or ordinary meaning and/or by expressly and/or impliedly carry the meaning as described at items (a) to (y) of para. 27.

**[6]** The meanings in para. 27(a) to (y) describe the plaintiffs as involved in corrupt practice, bribery, illegally obtaining profit or financial gain, gathering profit or wealth contrary to public interest, wasting public fund, cheating and misleading the public and ratepayers, not qualified and had not fulfilled the condition of contract causing it to be revoked, carrying an immoral business with sole purpose of making profit, conspiring with the DBKL officers/senior officers and/or Federal Territory Minister in misusing public fund to adorn entrances to the DBKL's building, offices of senior officials and that of the FT Ministers, committing a crime and/or gross misconduct until it became a "stink" and doing business or business concept and/or did not bring any benefit to DBKL and/or Plaintiffs' other customers.

**[7]** In defending the plaintiffs' action, the first and second defendants raised the defence of qualified privilege, defence of fair comment and defence of justification in their amended statement of defense.

**The Trial**

**[8]** Documents used during trial were marked as follows:

Bundle of Pleading - "A"

Common Bundle of Documents - "B1"

Common Bundle of Documents II - "B2"

Issues to be tried- "C"

Statement of Agreed Facts-"D"

**[9]** Witnesses who gave evidence for the plaintiffs were as follows:

Dato' Abd Halim bin Ali - SP1 - first plaintiff (WSPW1)

Bavani A/P Mahalingam - SP2 - The STAR Journalist (WSPW2)

**[10]** Witnesses who gave evidence for the defendants were as follows:

Tan Sri Ahmad Fuad bin Ismail-SD1-Former KL City Hall Mayor (WSDW 1)

Terrence Fernandez - SD2 - second Defendant - The SUN Journalist (WSDW 2)

Lim Ann Phang -SD3-The SUN Journalist (WSDW 3)

**The Agreed Facts**

**[11]** The first plaintiff is the sole proprietor of a business called Syarikat Mulia Sdn Bhd. The second plaintiff wrote a letter dated 18 January 2006 to the then Prime Minister seeking a five year contract for the supply of RM400,000 plants a month to the Dewan Bandaraya Kuala Lumpur ("DBKL"). By a letter of award dated 24 February 2006 ("the 2006 contract") DBKL appointed Syarikat Mulia on the terms and condition stipulated therein, to supply flowering plants for three years in consideration of a sum of RM33 million.

**[12]** The first defendant is a company which publishes a daily newspaper named "The Sun". The first defendant also publishes news in the internet *via* at website www.sun2surf.com. The second defendant wrote and the first defendant printed and published the words in English reproduced in para. 8 ("the first report"), para. 16 ("the second report") and para. 22 ("the third report") of the amended statement of claim.

**[13]** In the third report, reference was made to the plaintiffs. The third report was reproduced in the first defendant's website that is www.sun2surf.com publication of 13 November 2009 in the column of *Down to Earth - Terence Fernandez* (Every Tuesday & Friday).

**[14]** The first report and third report were also reproduced in the Sun e Paper' in its website www.sun2surf.com.

**The Law Of Defamation**

**[15]** The plaintiffs' action against the defendants is for a tort of defamation (libel) where it was alleged that the impugned articles defamed the plaintiffs.

**[16]** It is trite law of defamation that in order for the plaintiffs to succeed, the plaintiffs must prove all three elements that:

(i) the statement must bear defamatory imputations;

(ii) the statement must refer to the plaintiffs; and

(iii) the statement must be published by the defendants to a third person.

**[17]** The law is clearly stated in *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321,where Mohamed Dzaiddin J (as he was then) said as follows:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the Plaintiff to show (i) the words are defamatory; (2) the words refer to the Plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in this present case, the burden lies on the Defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the

Plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged. (*Rajagopal v. Rajan* [1972] 1 MLJ 45).

**[18]** This decision is followed in *Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32 and by YA Hakim Low Hop Bing in the case of *Ismail Shamsudin v. Abdul Aziz Abdan* [2007] 8 CLJ 65. See also *Subramaniam Paramasivam v. Courts Mammoth Bhd & Anor* [2011] 10 CLJ 739; [2010] 9 MLJ 363.

**[19]** The law further states that the burden of proof at this initial first stage would be on the plaintiffs. And if, and only if the plaintiffs successfully discharge this burden by proving all three elements, will the burden then shift to the defendants to prove the pleaded defence). This is what is known as the second stage (See *Lim Guan Eng v. Utusan Melayu (M) Bhd* [2012] 2 CLJ 619 as well as in *Subramaniam Paramasivam v. Courts Mammoth Bhd & Anor* [2011] 10 CLJ 739; [2010] 9 MLJ 363).

**The Statement Must Be Published By The Defendants (Third Element)**

**[20]** In this case, it is admitted that the impugned articles were written by the second defendant and published by the first defendant, therefore the plaintiffs have satisfied the third element that the 'statements were published to third persons' of the first stage.

**The Statement Must Refer To The Plaintiffs (Second Element)**

**[21]** With regards to the second element that "the statements refer to the plaintiffs", plaintiffs claim that the words which clearly refer to the plaintiffs in first report (exh. "P3") are the words 'RM32m deal', 'Three Year Contract', 'RM32.4 million three year contracts to supply flowers'. The deal, signed by Federal Territories Ministry officials'. The flowers and plants are for Kuala Lumpur City Hall (DBKL)' and 'flower supply deal'.

**[22]** Further, in the second report (exh. "P4"), plaintiffs claim that the words 'RM32 mil flower contract', 'a three-year RM32.4 million contract for flowers', 'The supplier', 'The flowers and plants, according to sources, include those with short life spans are for Kuala Lumpur City Hall (DBKL); 'The deal was signed by Federal Territories Ministry officials', 'the flower contract', and 'Bright Spark Sdn Bhd and 'the flower supply deal',. 'The deal was signed by Federal Territories Ministry officials' are words clearly refer to the plaintiffs.

**[23]** The defendants contended that exh. "P3" did not identify either of the plaintiffs whether expressly or by necessary implication. Exhibit "P3" was reproduced on the internet in the form of exh. "P4".The only difference between exh. "P3" and exh. "P4" is that exh. "P4" mentions that "the company concerned is Ampang based Bright Spark Sdn Bhd". Bright Spark Sdn Bhd is not a reference to the first plaintiff.

**[24]** It was further contended that in and of itself, the words "Ampang based Bright Spark Sdn Bhd" is not a reference to the second plaintiff. In support, exh. "D24" which is a Companies Commission of Malaysia (CCM) search of the second plaintiff shows that neither the registered nor business address of the second plaintiff is in Ampang.

**[25]** The defendants contended that in the first report (exh. "P3") it does not mention anywhere in the report about the plaintiffs. Reference was then made to exh. "P4", however exh. "P4" only mentions that "the company concerned is Ampang based Bright Spark Sdn Bhd". The search was made in exh. "D24" and clearly Bright Spark Sdn Bhd is not a reference to the second plaintiff and first plaintiff is neither a shareholder nor a director of the second plaintiff.

**[26]** At para. 24A of the amended statement of claim, plaintiffs already pleaded that exh. "P3", exh. "P4" and exh. "P5' (the impugned articles) when read exh. "P3", exh. "P4" and exh. "P5" together, the subject matter of the flower contract and the first plaintiff's name appears in exh. "P5" indeed refers to the plaintiffs. Plaintiffs alleged that the words contain in the impugned articles collectively and/or independently in their natural and/or ordinary meaning and/or expressly or impliedly carry the meaning as described at para. 27(a) to (y).

**[27]** I have considered the issue raised by the defendants. After perusing exh. "P3", exh. "P4" and exh. "P5", it is not disputed that the first plaintiff's name and the plaintiffs' two companies appear in exh. "P5" and the subject matter in the impugned articles refer to the plaintiffs. It is also admitted that the supply of flowering plants for three years in consideration of a sum of RM33 million to Syarikat Mulia refers to the plaintiffs. Therefore in respect of the second element, it is my considered opinion that this element has been satisfied.

**[28]** In order to succeed, it is for the plaintiffs to prove the first element that the impugned articles are defamatory. Therefore the issue for determination by this court is whether exhs. "P3", "P4" and "P5" (the impugned articles) contain defamatory words and whether the impugned articles in their natural and ordinary sense carry the meanings pleaded in para. 27(a) to (y) of the amended statement of claim.

**The Statement Must Bear Defamatory Imputations (First Element)**

*First Preliminary Issue*

*The Plaintiffs have not referred to any specific words in the Impugned Articles that are defamatory to the Plaintiffs.*

**[29]** The defendants raised this preliminary issue. In support of the proposition that the plaintiffs are restricted to the meanings set out in para. 27 of the amended statement of claim, it was submitted that in the case

*Lee Kuan Yew v. Chin Vui Khen & Anor* [1989] 1 LNS 190; [1991] 3 MLJ 494 at p. 498:

> The law that is relevant, is the general law relating to pleadings and I can do no better than to be guided by Ackner LJ in the case of *Lucas-Box v. News Group Newspapers Ltd* where his Lordship stated that law to be as follows:
>
> > It is axiomatic that the function of pleadings is to define the issues between the parties, so that the plaintiff and the defendant know what is the other side's case and thus everyone, counsel, judge and jury are able to focus upon the real nature of the dispute. Although to one it may mean a startling observation, we can see no reason why libel litigation should be immune from ordinary pleading rules.
> >
> > It has become the settled practice for a plaintiff, where the meaning of the words complained of is not clear and explicit, to plead the meaning which he says the words bear. This enables the defendant to know what case he has to meet and to prepare his defence accordingly. Such a practice is of further assistance to the court since it thus clearly provides to the trial judge the meaning upon which he must rule in deciding whether the words published are capable of being so understood. Per Siti Norma J (as she then was)

**[30]** A similar proposition is set out in *DDSA Pharmaceuticals Ltd v. Times Newspapers Ltd and Another* [1972] 3 All ER 419, CA at p. 419:

> In the first place, there ought to have been an innuendo pleaded. This article is capable of many different meanings - so many that it was necessary for the fair conduct of the trial that there should be pleaded a "popular" or "false" innuendo, or whatever you like to call it. In that innuendo the plaintiffs should set out the meaning or meanings which they say the words bear. That is necessary, not only for the fair conduct of the trial, but also to enable the defendants to know how what to plead, whether to plead justification or fair comment or to apologize. I need not go through all the cases ... Those cases establish that in most cases, if not all, it is necessary for the Plaintiff, even when they rely only on the natural and ordinary meaning of the words, to plead an innuendo setting out what they say is the natural and ordinary meaning of the words. per Lord Denning

**[31]** The defendants submitted that the impugned articles do not in their natural and ordinary sense carry the meanings pleaded by the plaintiffs in para. 27(a) to (y) of the amended statement of claim and are not defamatory of the plaintiffs.

**[32]** It was further submitted that the pleaded case therefore is embarrassing and defective. Accordingly, if the impugned articles are ambiguous, and capable of being interpreted in a way that is not defamatory, the non-defamatory interpretation is to be preferred: *Tony Pua Kiam Wee lwn. Syarikat Bekalan Air Selangor Sdn Bhd* [2013] 1 LNS 1433 Court of Civil Appeal W-02(NCVC)(W)-1464-06-2012:

> ... where the words complained of are capable of more than one meaning, the test, according to the authorities is, whether under the circumstances in which the impugned words were uttered by the appellant, a reasonable man to whom the publication was made, would be likely to understand it in the libelous sense. Where the Court is in doubt, a judge should rule them incapable of a defamatory meaning. The rationale being that **it is unreasonable that when there are a number of good interpretations the only bad one should be seized upon to give defamatory sense to the words**" per Anantham JCA at paragraph 19 (emphasis added).

**[33]** Therefore, the failure of the plaintiffs to set out meaning or meanings which they say the words bear, the defendants' case is that impugned articles criticised government procurement procedures ie, the rationale and manner in which the 2006 contract was awarded. It did not criticise or discredit the plaintiffs.

**[34]** The plaintiffs on the other hand submitted that their claim is that words in English in the impugned articles are falsely and/or maliciously written by the second defendant and/or published, printed and circulated by the first defendant. Plaintiffs further submitted that where a word is capable of two meanings, the meaning that is defamatory would still be considered by the court as the tone of the article - *English and Scottish Co-Operative Properties Mortgage and Investment Society, Limited v. Odhams Press, Limited* [1940] 1 KB 440, where "False Profit Return Charged against Society" in the headlines was a matter which could lead the jury to conclude that "false" would have been understood to mean fraudulent rather than merely mistaken.

## Opinion Of The Court

**[35]** Based on the pleadings in the amended statement of claim, the plaintiffs' allegation is that the contents in the impugned articles in their natural and/or ordinary meaning and/or by expressly and/or impliedly carry the meaning as pleaded in para. 27(a) to (y) of the amended statement of claim and are not true, false and are defamatory.

**[36]** Plaintiffs gave particulars under O. 78 r. 3(1) of the Rules of the High Court 1980 (this suit is filed before the new Rules of Court 2012) that the impugned articles (at paras. 7, 16 and 22) have been widely published and circulated in 'the Sun' newspaper, web site 'www.sunsurf.com' and 'the Sun ePaper' which are accessible to members of the public.

**[37]** The particulars of defamation and slander are pleaded at paras. 29 to 33 in a manner which stated that the publication of the impugned articles had scandalised the first plaintiff's company (Syarikat Mulia) and second plaintiff in Malaysia and outside the country with hatred, contempt or ridicule and suspicion which caused aggravated damages to plaintiffs' reputation and lost.

**[38]** The aggravated damages are pleaded at paras. 34 and 35 of the amended statement of claim where the plaintiffs alleged that facts reported such that "Mayor denies revoking contract" and the scope and nature of plaintiffs' contract reported by the defendants are false and defamatory.

**[39]** The law is trite and the issue is whether the words used in the impugned articles were used in a defamatory sense. Further, the question is whether the ordinary man, on reading the whole context of the impugned articles, would understand them to carry the meanings or sense alleged in para. 27(a) to (y) of the amended statement of claim.

**[40]** I agree with the defendants' submission that there is no pleading setting out the particular/specific words or paragraph or sentence in the impugned articles complained of which are alleged to be defamatory to the plaintiffs that carry the meanings alleged in para. 27(a) to (y) of the amended statement of claim.

**[41]** The plaintiffs' pleading at para. 11 merely sets out the following paragraphs or sentences in the first report (exh. "P3"), show they refer to the plaintiffs:

(i) RM32.4 million three year contracts to supply flowers;

(ii) The deal, signed by Federal Territories Ministry officials under the tenure of former mayor Abdul Hakim Borhan;

(iii) The flowers and plants are for Kuala Lumpur City Hall (DBKL)'s new tower on Jalan Raja Abdullah;

(iv) These include ... agreements such as flower supply deal.

**[42]** Further, in the second report (exh. "P4") at para. 20, the words as follows are also meant to refer to the plaintiffs:

> (i) 'RM32 mil flower contract', 'a three-year RM32.4 million contract for flowers', 'The supplier', The flowers and plants, according to sources, include those with short life spans are for Kuala Lumpur City Hall (DBKL); 'The deal was signed by Federal Territories Ministry officials', 'the flower contract', and 'Bright Spark Sdn. Bhd. and 'the flower supply deal'.

**[43]** At para. 24, plaintiffs claim that the third report (exh. "P5") which has been reported in verbatim by the first defendant refers to the plaintiffs.

**[44]** At para. 24A, plaintiffs reiterated the pleading in paras. 11 to 13 and pleaded that when the first report (exh. "P3"), the second report (exh. "P4") and the third report (exh. "P5") read together, they refer to the plaintiffs.

**[45]** It is not disputed that the words stated at the aforementioned paragraphs above are words reported by the defendants which have referred to the plaintiffs.

**[46]** The plaintiffs' pleading clearly on the allegation that words in the impugned articles read collectively or in independently carry the meanings pleaded in para. 27(a) to (y). Based on the plaintiffs' pleading, my view is that the plaintiffs besides pleading the whole article, should have in addition, pleaded the particular words or phrases or sentences or paragraphs in the article complained of which they say the words bear which, when read in the context of the whole article, are defamatory to the plaintiffs.

**[47]** Therefore, my opinion is that the plaintiffs have not addressed the question of whether which are the particular/specific words or paragraph or sentence in the impugned articles complained of in their natural and ordinary sense carry any of the meanings pleaded in para. 27(a) to (y) of the amended statement of claim and whether those meanings are defamatory of the plaintiffs.

**[48]** It is my considered opinion that the plaintiffs should have specified which parts of those articles or statements are said to be defamatory. It is not disputed that there are many words or sentences or paragraphs reported in the impugned articles and some may not be related or can be inferred as not reference to the plaintiffs or alleged to be defamatory. It is necessary for the plaintiffs, even when they rely only on the natural and ordinary meaning of the words, to plead an innuendo setting out what they say is the natural and ordinary meaning of the words (See *DDSA Pharmaceuticals Ltd v. Times Newspapers Ltd And Another* [1972] 3 All ER 419, CA at p. 417).

**[49]** In the case of *Lim Kit Siang v. Datuk Dr Ling Liong Sik & Ors* [1996] 1 LNS 106; [1997] 5 MLJ 523, Zainun JC (as Her Ladyship then was) said:

> ... suffice it to state here that the statement in the Star newspaper alleged to be defamatory falls short of being so since there is no identification of the part which is alleged to be defamatory.
>
> It is usual in cases of this nature to point out the offending passage by highlighting them.

**[50]** The case of *Dato' v. Kanagalingam v. David Samuels & Ors* [2006] 3 CLJ 909; [2006] 6 MLJ 521, also said the same thing that where the whole article was produced and there was no express pleading on the words alleged to be defamatory, Justice Mohd Hishamudin in dismissing the plaintiffs' claim stated *inter alia* as follows:

> The plaintiff's pleading is defective. As the article is a long article, the plaintiff besides pleading the whole article, should have in addition, pleaded the particular words or phrases or sentences or paragraphs in the article which, when read in the context of the whole article, are defamatory to the plaintiff.

Further, the court also stated that:

> It is not the duty of the court on its own volition to speculate and to pick out for the plaintiff a case that fits his statement of claim.

**[51]** It is correctly said that it is usual in cases of this nature to point out the offending passage by highlighting them (see *Lim Kit Siang v. Datuk Dr Ling Liong Sik & Ors*).

**[52]** My considered opinion is that the plaintiffs' pleaded case therefore is embarrassing and defective. Accordingly, if the impugned articles are ambiguous, and capable of being interpreted in a way that is not defamatory, the non-defamatory interpretation is to be preferred (see *Tony Pua Kiam Wee lwn. Syarikat Bekalan Air Selangor* Sdn Bhd [2013] 1 LNS 1433 Court of Civil Appeal W-02(NCVC)(W)-1464-06-2012).

**[53]** The plaintiffs having only pleaded the natural and ordinary meanings, the plaintiffs are confined to the meanings in para. 27(a) until (y) of the amended statement of claim. They cannot now allege a new defamatory meaning. In *Slim And Others v. Daily Telegraph, Ltd & Anor* [1968] 1 All ER 497 at p. 506, CA, it was held:

> The plaintiffs, as they were entitled to do, choose to set out in their statement of claim the particular defamatory meaning which they contended were the natural and ordinary meaning of the words. Where this manner of pleading is adopted, the defamatory meaning so averred is treated at the trial as the most injurious meaning which the words are capable of bearing, and the plaintiff is, in effect, estopped from contending that the words do bear a more injurious meaning and claiming damages on that basis. - Per Diplock L.J

**[54]** Based on the decisions cited in the above cases, obviously the failure to specify which parts of those articles are said to be defamatory would render the pleading as defective and liable to be struck out. Based on this reason the defendants' preliminary issue is allowed.

*Second Preliminary Issue*

Order 78 r. 3 of the Rules of the High Court 1980

**[55]** The defendants raised another preliminary issue that the plaintiffs failed to serve a reply under O. 78 r. 3 of the RHC 1980.

**[56]** Plaintiffs gave particulars under O. 78 r. 3(1) of the RHC 1980 that the impugned articles (at paras. 7, 16 and 22) have been widely published and circulated in 'the Sun' newspaper and the electronic media which are accessible to members of the public.

**[57]** The plaintiffs gave the particulars of malice at paras. 36 to 40 *inter alia* that the defendants never contacted the plaintiffs to give their view before publishing the impugned articles; published the impugned articles with full knowledge that the impugned articles were false or not true; and in the alternative that the impugned articles were published with the intention to injure the plaintiffs' reputation and/or business and was recklessly published without due regard whether they were false or inaccurate.

**[58]** The plaintiffs set out the particulars of malicious falsehood at paras. 41 to 42 by claiming that the publication and circulation of the impugned articles whether jointly or severally has caused the plaintiffs to suffer special damages to the plaintiffs' business and/or contract and put the plaintiffs in jeopardy.

**[59]** The defendants in their amended statement of defence gave their particulars pursuant to O. 78 r. 3(2) of the Rules of the High Court 1980 wherein at para. 10, the defendants pleaded that the impugned articles in paras. 8, 16 and 22 of the amended statement of claim respectively are statement of facts. The defendants produced all the facts reported in the impugned articles at paras. 10.1 until 10.4 and claim that those facts are true.

**[60]** At para. 11, the defendants stated that further or alternative, based on the matters stated in para. 10.4(a) - (e), the words complained of were fair comments on a matter of public interest. The defendants stated that it is the right of the public to be informed of how public funds are spent by DBKL. It is in the public interest that the public be fully informed of the 2006 contract, and the attempt by the plaintiffs to renew the contract for RM90 million over five years.

**[61]** O. 78 r. 3(2) of the RHC 1980 says that where in an action for libel or slander the defendants allege that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

**[62]** The defendants argued that the only way to defeat defences of qualified privilege and fair comment on a matter of public importance is for the plaintiffs to plead and prove express malice:

> When words are published which are both false and defamatory, the law presumes malice on the part of the person who publishes them. However, when the publication takes place under circumstances which create qualified privilege the presumption of malice is rebutted by the privilege and the plaintiff has to prove express or actual malice on the part of the person responsible for the publication to defeat the privilege ...
>
> The onus lies on the plaintiff to prove malice and not the defendant to prove his *bona fides* or absence of malice. per KN Segara J (as he then was) *Hoe Thean Sun v. Lim Tee Keng* [1999] 1 CLJ 187 @ 191.

**[63]** What is meant by malice? Put succinctly, "... the common law has always regarded malice as the publishing of defamatory material with an improper motive, *Rackham v. Sandy* [2005] EWHC 482 (QB) para. 18 citing

the decision of the High Court of Australia in *Roberts v. Bass* [2002] HCA 57. In *Horrocks v. Lowe* [1974] 1 All ER 662 at p. 669 (c-e), Lord Diplock described malice in the following terms:

> So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in *bona fide* protection of his own legitimate interests.

**[64]** In short, in order to establish express malice sufficient to defeat a defence of fair comment or qualified privilege, the plaintiffs must establish that the defendants were actuated by a dominant desire to injure the plaintiffs. It is not enough to establish that the reporter was careless or acted unreasonably, unless it is also established that he was deliberately careless or unreasonable because he was actuated by a dominant desire to injure the plaintiffs. Knowledge of, or recklessness as to, the falsity of the report is not in a separate head of malice. It is only part of the evidence, which the court must consider together with other evidence, when deciding whether the reporter was actuated by an improper motive.

**[65]** Therefore, defendants submitted that pursuant to O. 78 r. 3(3) of the Rules of Court 2012, if the plaintiffs wish to prove express malice they "must serve a reply giving particulars of the facts and matters from which malice is to be inferred". A plea of express malice is a very serious allegation of intentional impropriety and the rules of pleading allegations of this kind are strict. Accordingly:

(a) a plea of express malice cannot be made in the statement of claim. It must be made by a reply;

(b) generalised or formulaic statements will not be permitted. The plea of malice must expressly state what the defendants did or said or knew; and

(c) a failure to properly plead and particularise express malice means that the plaintiffs cannot make such an allegation at the trial.

**[66]** Order 78 r. 3(3) clearly says that if the defendants pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendants was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

**[67]** The defendants submitted that in this case there is no reply was filed. The plaintiffs are not entitled to rely on paras. 36 to 40 of the amended statement of claim to allege and prove express malice. Further and in any event, paras. 36 to 40 of the amended statement of claim consist merely of generic allegations. They do not amount to a proper plea of malice within O. 78 r. 3(3). The plaintiffs should have, but did not, make allegations of the specific facts about what the defendants did or said or knew which they relied on to establish malice. A good example of the kind of matters that are required to be set out as particulars to satisfy O. 78 r. 3(3) is given in para. 9 of *Rackham v. Sandy*, which the judge later in his judgment summarised in these words:

> [100] I have set out at para 9 above the Particulars of Malice. As is invariably the case, those particulars are directed mainly to the falsity of the words complained of and the reasons relied on for the contention that the Defendants had knowledge of their falsity or were reckless. The Particulars include detailed reasons why it is alleged that the Defendants knew that their jobs were under threat: see para 5.1 of the Reply. The dominant motive pleaded at para 5.24 is that of "injuring the Claimant (whom [the Defendants did not like) and forcing him to resign from the Board of WRG and/or in an improper attempt to save their own jobs.

**[68]** The case of *Rackham v. Sandy* [2005] EWHC 482 (QB) is as follows:

> [18] Miss Page advances an interesting argument based on the decision of the High Court of Australia in *Roberts v. Bass* [2002] HCA 57. In that case Gleeson CJ, with whose judgment the majority agreed, said at paras 77-78:
>
> > If the defendant knew that the statement was untrue when he or she made it, it is almost invariably conclusive evidence of malice. That is because a defendant who knowingly publishes false and defamatory material almost certainly has some improper motive for doing so, despite the inability of the plaintiff to identify the motive. In *Barbaro v. Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 51, Hunt J said that "[i]n some of the older authorities, an absence of honest belief on the part of the defendant is treated merely as some evidence of an indirect motive which alone is said to constitute express malice, but the better view, in my opinion, is to treat the two as different kinds of malice". His Honour cited no authority for this novel proposition. Some years later, in *Hanhrahan v. Ainsworth* (1990) 22 NSWLR 73 at 102-103, Clarke JA said that, since *Horrocks* "it has been accepted that if it is proved that a person has made a defamatory statement without an honest belief in its truth or for a dominant improper purpose ... malice will be made out".
>
> The knowledge and experience of Justice Hunt in defamation matters is well recognised. But with great respect to his Honour and Clarke JA, they erred in asserting that lack of honest belief defeated a defence of qualified

privilege. There is no basis in principle or authority for treating knowledge of falsity or lack of honest belief as a separate head of, or equivalent to, malice. In the law of qualified privilege, the common law has always regarded malice as the publishing of defamatory material with an improper motive. Knowledge of falsity is "almost conclusive evidence" that the defendant has some improper motive in publishing the material and that it actuated the publication. That judges have treated knowledge of falsity as almost conclusive evidence of malice is no ground, however, for treating it as a separate head of, or equivalent to, malice. In some circumstances, lack of honest belief in what has been published may also give rise to the inference that the matter was published for a motive or purpose that is foreign to the occasion of qualified privilege. Nothing in Lord Diplock's speech in *Horrocks* supports treating the defendant's knowledge or lack of belief as a separate head of, or equivalent to, malice. Indeed, Lord Diplock expressly said that, if it is proved that the defendant did not believe that what he or she published was true, it was "generally conclusive evidence" of improper motive.

Miss Page submits that malice arises if and only if it can be shown that the defendant was actuated by some improper motive. Knowledge of falsity is not a separate head of malice, still less is recklessness, it is simply a way of establishing an improper motive.

[19] I am of course bound by the decision in *Horrocks v. Lowe*. But I respectfully agree with Gleeson CJ that there is nothing in Lord Diplock's speech in that case which supports treating the defendant's knowledge of falsity or lack of belief in truth as being probative, of itself and without more, of malice. It may be said that the point is of limited practical significance since knowledge of falsity will almost always establish the existence of an improper motive.

[20] It is common ground and I accept that, when it comes to motive, what must be established against the individual defendant is that improper purpose was his dominant motive for publishing, as is apparent from the passage already cited from *Horrocks v. Lowe*.

[21] I also accept that Miss Page is right to emphasise that a defendant who honestly believes in the truth of what was published is not to be found guilty of malice merely because his belief was unreasonable or was arrived at after inadequate research or investigation. Lack of care in arriving at a belief is not to be equated with malice: see *Telnikoff v. Matusevitch*; *Gatley* at para 16.17. per Gray J.

**[69]** The plaintiffs' counsel on the other hand submitted that it would not be necessary to do that because according to him the House of Lords in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 has created a form of qualified privilege for publications to the general public on matters of public concern. However, although this is formally founded on duty and interest, the very existence of the privilege requires that the defendants has adhered to the standards of "responsible journalism" and this involves matters like

the nature of the steps taken to verify the information and whether comment was sought from the claimant. In other words, the mere fact that the defendants honestly believes in the truth of what he says does not of itself provide a basis for the privilege.

**[70]** According to him, malice is in-built into the ten criteria of *Reynolds*. As David Price observed, "In theory, a *Reynolds* based defence can be lost by malice. In practice, it would seem difficult to establish. Unlike the common law duty and interest qualified privilege, there is an in-built element of reasonableness and responsibility in the *Reynolds* test. If the defendant can show that his conduct is sufficiently reasonable and responsible, to enable him to establish a *Reynolds* defence, it is difficult to see how a claimant could establish malice" (see *Loutchansky (supra)* at para 51, Tab F of BA I). However, "The claimant might choose to rely on the source of evidence which could be used to establish malice solely on rebuttal of *Reynolds* defence. If the evidence is sufficiently strong, the likelihood is that a judge will rule against qualified privilege and the issue of malice will not arise." (see David Price, p. 125)

**Opinion Of The Court**

**[71]** Firstly, since the first preliminary issue has been ruled in favour of the defendants and the plaintiffs' claim is liable to be struck off, it is not necessary for this court to further make any ruling on this second preliminary issue. Secondly it is trite law of defamation that if, and only if the plaintiffs successfully discharges this burden by proving the required elements, will the burden then shift to the defendants to prove the pleaded defence. Therefore until the first stage is determined, any ruling on the preliminary issue would be premature.

**[72]** However, for the sake of the arguments that have been made in respect of the issue, this court will give its own opinion.

**[73]** I have considered the defendants' and the plaintiffs' comprehensive submissions on this point. The preliminary issue raised by the defendants arose from the plaintiffs' pleading and the defendants pleaded defence of qualified privilege and fair comments.

**[74]** The defendants argued that the plaintiffs are not entitled to rely on paras. 36 to 40 of the amended statement of claim to allege and prove express malice. From the defendants' point of view, the fact of the matter is that the plaintiffs have not filed a reply in the first place in instant case before this court, let alone comply with the requirement to set out in the reply the particulars of facts and matters from which malice is to be inferred. The requirement of filing and serving a reply setting out facts and matters from which malice is to be inferred (to destroy a defence of qualified privilege raised) is a mandatory requirement under O. 78 r. 3(3) of the Rules of Court,

2012 which the plaintiffs have failed to comply with. In the result, the plaintiffs have failed to successfully invoke malice to negate the defence of qualified privilege relied on by the defendants, and the said defence should therefore prevail. The issue of 'malice' is therefore a non-starter.

**[75]** The plaintiffs argued that the defendants were not entitled to rely on qualified privilege. Plaintiffs are relying on the case *Reynolds v. Times Newspapers Ltd*, where the very existence of the privilege requires that the defendants has to adhere to the standards of "responsible journalism" and this involves matters like the nature of the steps taken to verify the information and whether comment was sought from the claimant.

**[76]** The plaintiffs contended that the conduct of first defendant was not one of responsible journalism. The duty to publish can only arise where the journalist has behaved responsibly. (See *Loutchansky v. Times Newspapers Ltd And Others* [2001] 4 All ER 115).The case of *Miller v. Associated Newspapers Ltd* [2003] EWHC 2799 (QB) cited by the plaintiffs, G, Eady J held that to establish the ingredients of qualified privilege, the court must look at the pleading to see what factors are relied upon to establish the public's right to hear a partial account of an internal review which was interim.

**[77]** My considered opinion is that the defence of qualified privilege is qualified as its name suggests, and ordinarily can be destroyed if the plaintiffs are able to raise and show evidence that the defendants were motivated by express malice in publishing the words complained of. The onus in proving actual or express malice lies with the plaintiffs.

**[78]** The case of *Subramaniam Paramasivam v. Courts Mammoth Bhd & Anor* [2011] 10 CLJ 739; [2010] 9 MLJ 363, cited by the defendants is clearly on point where the learned High Court Judge held O. 78 r. 3 of the Rules of the High Court 1980 operates to make a mandatory requirement that if the plaintiffs dispute the defence of privilege on the grounds of malice, the plaintiffs must serve a reply giving particulars of the facts and matters from which malice is to be inferred.

**[79]** In *Gatley on Libel & Slander* (12 edn (2013) it says as follows:

> There is a specific rule of pleading that whenever it is intended to allege in answer to a plea of honest comment or qualified privilege that the defendant was actuated by express malice, the claimant must serve a reply giving particulars of the facts and matters from which the malice is to be inferred. Malice is a very serious allegation of intentional impropriety or bad faith and the rules of pleading allegations of this kind are strict. It is not sufficient merely to plead that the defendant acted maliciously. The plea must be more consistent with the presence of malice than with its absence; if it is not, it is liable to be struck out. Generalised or formulaic statements will not be permitted. The plea of malice must focus upon what the defendant did or said or knew. The court will be sceptical about pleas of malice in which the claimant pitches the meaning high and then

asserts that the defendant did not or could believe that high meaning to be true, and so is malicious. The claimant must allege specific facts from which it is alleged the inference is to be drawn.

**[80]** The plaintiffs are relying on the case *Reynolds v. Times Newspapers Ltd* in reply to the issue raised by the defendants. I refer to the case of *Lim Guan Eng v. Utusan Melayu (M) Bhd* [2012] 2 CLJ 619, Varghese George Varughese J held that:

Qualified Privilege in Common Law

[39] The qualified privilege in common law available to a newspaper or other media-related entities in the context of defamation actions against them, was a special defence deriving its basis from the duty of the press to the public at large.

It was unlike the defence of 'absolute privilege' (where no legally recognisable claim would be recognised at all) or the 'classical' form of qualified privilege (or its statutory reenactment, for example, as found in s. 12 of our Defamation Act 1957) which had as its very foundation the special treatment accorded in law to the 'occasion' of the publication of the alleged material, which would have otherwise been defamatory in ordinary course of events.

This category of qualified privilege in common law traced its development and recognition to the decision of the House of Lords in the case of *Reynolds v. Times Newspaper Ltd* [2001] 2 AC 127. Australia and New Zealand had also variants of this same defence of qualified privilege that could be availed of by print or other media practitioners. My brother Harminder Singh Daliwal JC, has admirably collated and summed up the respective position in those jurisdictions on this subject, in His Lordship's judgment in *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 5 CLJ 301.

[40] Suffice it for me for the purposes of determining the issues in this action to refer to *Gatley on Libel and Slander*, (11th edn) at para. 14.2 (p. 439) where it is commented as follows:

> The *Reynolds* category is not confined to publication through the 'media', though in practice that will be the context of almost all the cases. The very existence of the privilege in this type of case, however, is a matter which involves a closer scrutiny of the facts of the particular case. It involves questions like the extent to which the defendant took steps to verify the information he imparted, the urgency of the matter, the extent of the public's 'right to know' about it and whether the defendant has sought any explanation or comment from the person about whom the statement is made.

[41] Again in *Gatley*, at para. 15.3 (at p. 520) it is noted that Lord Nicholls's in this *Reynolds*' case had set out a non-exhaustive list of circumstances, which would be relevant to this privilege issue in a 'media' case, amongst which were the following:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information and the extent to which the subject matter is a matter of public concern.
3. ...
4. The steps taken to verify the information.
5. ...
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegation as statement of facts.
10. ...

[42] The underlying basis of the *Reynolds* 'type privilege has been often described on 'responsible journalism'. This principle was applied in the later House of Lords decision in *Jameel Mohamed v. Wall Street Journal Europe SPRL* [2006] UKHL 44: [2007] 1 AC 359, although it was opined there that the question of 'responsible journalism' (as spelt out in the *Reynolds*' case) should be approached in a practical and more flexible manner. In *Jameel*'s case evidence was led to show that the journalist/correspondent had sought Jameel's comments on the morning before the publication and the House of Lords was of the view that steps taken to gather and publish the information was responsible and fair in that particular fact situation.

[43] The law on whether 'malice' was still relevant in this *Reynolds*' type of qualified privilege in common law (the traditional form of qualified privilege is defeated by proof by the claimant of malice on the part of the defendant) was not very clear. (See para. 15.8 in *Gatley's: Irrelevance of Malice*).

[44] However as for me I was bound to and guided by O. 78 r. 3(3) of the Rules of the High Court 1980. In effect that procedural provision required the plaintiff who wishes to demolish the defence of privilege on the grounds that the defamatory statements were actuated by express malice, to file "a reply giving particular of the facts and matter from which the malice is to be inferred."

'Malice' and Whether It Had Been Pleaded

[45] The question that I had to then determine was whether the plaintiff had complied with the requirements of O. 78 r. 3(3) of the Rules of the High Court 1980. The defendant on the one hand contended that malice

A or particulars of alleged malice had not been pleaded by the plaintiff. The plaintiff on the other hand maintained that they had duly complied with the requirements of that rule and specifically referred to para. 11 of the statement of reply filed for the plaintiff.

**[81]** As for me I concur with my learned brother's opinion in the above B case and I am bound to and guided by O. 78 r. 3(3) of the Rules of the High Court 1980. In the above said case, the plaintiffs had filed the statement of reply. In this case, and more importantly, the plaintiffs have not alluded to any specific malice on the part of the defendants by setting out specific particulars of the facts and matters in relation to it, which is required to be C set out in their reply to defence and from which malice is to be inferred. The requirement of filing and serving a reply setting out facts and matters from which malice is to be inferred (to destroy a defence of qualified privilege raised) is a mandatory requirement under O. 78 r. 3(3) of the Rules of Court 2012 which the plaintiffs have failed to comply with. (See *Evans on Defamation in Singapore and Malaysia* (Third Edition) by Doris Chia and D Rueben Mathiavaranam).

**[82]** An example of how this ought to be done is shown in English in the sample 'reply' alleging malice in *Atkin's Encyclopaedia of Court Forms* as well as in Malay in the sample 'Jawapan' in Defamation Handbook. (See *Atkin's* E *Encyclopaedia of Court Forms in Civil Proceedings* (Second Edition) (Vol. 25) (1998 Issue) pp. 196 - 197, Form 83), *Defamation Handbook (MLJ Handbook Series)* By Lorraine Cheah pp. 158 - 159, Form 541 (B).

**[83]** The fact of the matter is that the plaintiffs have not even filed a reply in the first place in instant case before this court, let alone comply with the F requirement to set out in the reply the particulars of facts and matters from which malice is to be inferred. The requirement of filing and serving a reply setting out facts and matters from which malice is to be inferred (to destroy a defence of qualified privilege raised) is a mandatory requirement under O. 78 r. 3(3) of the Rules of Court, 2012 which the plaintiffs have failed to G comply with. In the result, the plaintiffs have failed to successfully invoke malice to negate the defence of qualified privilege relied on by the defendants, and the said defence should therefore prevail. The issue of 'malice' is therefore a non-starter.

**[84]** Apart from the case of *Subramaniam Paramasivam v. Courts Mammoth* H *Bhd & Anor* cited by the defendants, in *M Prabhakaran v. Salam Seran* [2001] 3 CLJ 615 at pp. 636 to 638, it was held that:

> The crux of the issue is, whether it is mandatory for the plaintiff to serve a reply under O. 44 r. 3(3) of the SCR 1980 if the plaintiff intends to allege that the defendant was actuated by express malice when compared to the I proviso in O. 19 r. 22 RSC 1957 or is the plaintiff allowed to rely on its statement of claim. This court is of the view that in order to determine this issue both the word "shall" in O. 19 r. 22 RSC 1957 and the word

"must" in O. 44 r. 3(3) SCR 1980 must be considered. The use of the word "shall" in O. 19 r. 22 RSC 1957 is merely directory and implies some discretion (see *Soong Ah Chow & Anor v. Lai Kok Cheng* [1984] 1 CLJ 152; [1984] 1 CLJ 360 (Rep); [1986] 1 MLJ 42) whereas the use of the word "must" instead of "shall" in O. 44 r. 3(3) SCR 1980 will itself be sufficient to hold the expression to be mandatory.

In the circumstances, this court is of the view that in order for the plaintiff to rely on express malice, he "must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

Therefore, it is the view of this court that it was a mandatory requirement on the part of the plaintiff to have served a reply giving particulars of the facts and matters from which the malice is to be inferred as required under O. 44 r. 3(3) SCR 1980. However, since the plaintiff had failed to serve a reply pleading express malice as required under O. 44 r. 3(3) SCR 1980, he cannot be allowed to rely on express malice without having served the reply to defeat the defence of qualified privilege as only the reply will form the pleadings in the civil suit. per VT Singham JC (as he then was)

**[85]** In *Dato' Wan Hashim Wan Daud v. Mazlan Ibrahim & Anor* [1997] 5 CLJ 140:

From the authorities there is a distinction being drawn between express malice and malice in law. The latter kind of malice may be presumed from the fact of the publication of defamatory words, so that the plaintiff need not prove it. (See *Belt v. Lawes* [1882] 51 LJQB 359, DC). Whereas express malice which is actual malice or malice in fact has to be pleaded and proven by the plaintiff. I agree with the submission of the learned counsel for the plaintiff that O. 78 r. 3(3) RHC refers to this latter kind of malice and not to malice in law. Therefore, if the plaintiff merely seeks to rely on malice in law there is no requirement for the plaintiff to serve a reply to the defendant's defence. The failure of the plaintiff to serve a reply to the defence would of course deny the plaintiff from adducing evidence of actual malice which is necessary in order to rebut the defence of qualified privilege or fair comment raised by the 2nd defendant. per Arifin Zakaria J. (as he then was)

**[86]** I agree with the defendants that there is no reply filed by the plaintiffs providing the specific facts about what the defendants did or said or knew which they relied on to establish malice as required under O. 78 r. 3(3) which clearly uses the words "must". The words "must" has been held to be mandatory.

**[87]** In the instance case, the crux of the plaintiffs' case is that they are alleging that the words complained of in the impugned articles are false and malicious. Following the principles in *Rackham v. Sandy* and *Horrocks v. Lowe* my view is that when the plaintiffs contended that the defendants had falsely or maliciously or were reckless in publishing the impugned articles, the plaintiffs must include and/or give particulars detailing reasons why it is

alleged that the defendants knew that the words published were false and were actuated by a dominant desire to injure the plaintiffs' business. It is not enough to establish that the reporter was careless or acted unreasonably, unless it is also established that he was deliberately careless or unreasonable and has caused the plaintiffs to suffer special damages to plaintiffs business and/or contract and put the plaintiffs in jeopardy.

**[88]** Therefore, it is the view of this court that it was a mandatory requirement on the part of the plaintiffs to have served a reply giving particulars of the facts and matters from which the malice is to be inferred as required under O. 78 r. 3(3) of the Rules of the High Court 1980. However, since the plaintiffs had failed to serve a reply pleading express malice as required under O. 78 r. 3(3) of the Rules of the High Court 1980, he cannot be allowed to rely on express malice without having served the reply to defeat the defence of qualified privilege as only the reply will form the pleadings in the civil suit.

**[89]** In the absence of any evidence, indeed of any allegation, that the dominant motive of the defendants was to harm the plaintiffs, malice has not been made out. I would respectfully once again refer to *Lim Chee Kuo v. The Pacific Bank Bhd* [1999] 1 CLJ 270, where Haidar J (as he then was) made clear that malice required clear evidence and could not be established based "on beliefs, impressions and conjectures which, with respect, are insufficient to sustain an action for malicious prosecution."

**[90]** At para. 40 of the amended statement of claim: the defendants published the impugned articles recklessly without regard to whether it is true or false. At the outset, even if this were true, by itself it would not suffice to establish malice unless the dominant motive of the impugned articles was to damage the plaintiffs. That has not been established.

**[91]** Further, no particulars have been pleaded by the plaintiffs as to what was the reckless conduct of the defendants to show malice. The plaintiffs should have, but did not make allegations of the specific facts about what the defendants did or said or knew which were reckless.

**[92]** Since the plaintiffs had failed to serve a reply pleading express malice as required under O. 78 r. 3(3) of the RHC 1980, he cannot be allowed to rely on express malice without having served the reply to defeat the defence of qualified privilege as only the reply will form the pleadings in the civil suit. To recap therefore, that the words in the impugned articles at paras. 8, 16 and 22 of the amended statement of claim were published on a privileged occasions, and are hence protected by the defence of qualified privilege, which is unassailable due to the absence of any evidence of malice which the plaintiffs has been able to raise and prove.

*Are The Impugned Articles Defamatory?*

**[93]** In earlier part of my judgment I have ruled that the plaintiffs' failure to specify which parts of those articles or statements complained of in the impugned articles are defamatory had rendered the plaintiffs' pleading as defective which led the court to agree with the defendants' preliminary issue and plaintiffs' claim is liable to be struck off.

**[94]** For the sake of completeness, this court will proceed to make a finding whether the impugned articles are defamatory.

**[95]** The contents of the plaintiffs' written submission, it was confined to attacking the defences raised by the defendants in the amended statement of defence and as well as the defendants' written submission.

**[96]** In the submission, the plaintiffs concluded that the defendants have failed to avail themselves to any specific defences recognised in law.

**[97]** The plaintiffs' conclusion is that the words used and/or published in the impugned articles are defamatory to the plaintiffs in their natural and ordinary meaning. It was submitted that any reasonable reader could have understood and/or inferred from the words complained of that the plaintiffs are to be viewed unfavourably and will reduce the plaintiffs in estimation of the general public.

**[98]** In the first place, my view is that the plaintiffs have failed to specify or particularise which are the words in the impugned articles complained of to bear defamatory meaning or meanings. However, the plaintiffs' conclusion was premised on grounds that the 'facts' reported by first defendant are false because the first defendant did not verify the information from the unidentified source the 'facts' reported by him were plainly false and inaccurate.

**[99]** The law of defamation assets out in *Ayob Saud v. TS Sambanthamurthi* clearly states that the burden of proof at this initial first stage would be on the plaintiffs. The plaintiffs so far have successfully proved two elements (the second and third elements) and they need only to prove the first element whether ie, the statements bear defamatory imputations and if, and only if the plaintiffs successfully discharge this burden by proving this final element, will the burden then shift to the defendants to prove the pleaded defence.

**[100]** Therefore, I have considered the plaintiffs' submission and reply to defendants' submission, the plaintiffs relied on the English Court of Appeal decision in *English and Scottish Co-Operative Properties Mortgage and Investment Society, Limited v. Odhams Press, Limited* [1940] 1 KB 440 to submit that where a word is capable of two meanings, the meaning that is defamatory would still be considered by the court based on the tone of the article.

**[101]** However, I agree with the defendants' submission that the *English and Scottish Co-Operative Properties* case, the Court of Appeal held that in a defamation trial involving a jury and where the words complained of were ambiguous, the trial judge was right to leave to the jury to decide whether or not the words complained of were capable of a defamatory meaning.

**[102]** Based on the plaintiffs' pleading, it can be inferred that the words complained of if any, is the whole words used or the whole context of the impugned articles.

**[103]** It is the defendants' contention that, read as a whole, the impugned articles criticise government procurement procedures ie, the rationale for and manner in which the 2006 contract was awarded.

(a) Exhibits "P3" and "P4" say:

(i) "The cancellation of the contract is part of the mayor's efforts to right wrongs and questionable decisions and policies of previous administrations. Also as times are bad the DBKL needs to focus its limited resources on more important issues."

(ii) The Mayor DW1 himself was quoted as saying "I felt that it was a total waste of funds to throw money on such extravagance, especially during current lean times. When the deal was struck, I think they did not consider the capacity of DBKL to pay"

(b) Exhibit "P5" says:

(i) "Only issue is it is public money that is going towards filing the pockets of those behind the venture".

(ii) "It is not one's intention to throw sand into the rice bowls of Syarikat Mulia and Brightmark Sdn Bhd. As profit-oriented businessmen, one cannot blame them for jumping on such a rosy deal that would bring them in excess of RM32 million in three years."

(iii) "Again, my quarrel is not so much with the businessmen, but what was running through the minds of the guardians of our coffers when they approved such extravagance for plants? Were they thinking at all? Or were they putting individual interests over the public interest?"

(iv) "All I can say is thank goodness that for a change we have a civil servant who is willing to stand up to questionable decisions and abuse of the public trust."

(v) "Instead of repeating the now stale mantra of "this was before my time", Mayor Datuk Ahmad Fuad Ismail made the difficult decision to act in favour of the rakyat instead of political masters".

(vi) "Ahmad Fuad must not be made to pay the price for standing by his principles and doing right by the people. After all, wasn't he sent to DBKL to clean it up? You don't penalise a man for doing his job".

(vii) "Datuk Seri Mohd Najib Razak must ensure that the vultures that have infiltrated public offices are removed and kept at bay. He must haul up and remove ministers who not only do not perform but also try to use their influence and power to gain favours for themselves and their minions".

**[104]** In my considered opinion, the above statements may be interpreted as do not criticise or discredit the plaintiffs. The impugned articles also give credit where it is due, to DW1. Therefore, the above statements may carry different meanings and interpretation under the circumstances in which the impugned words were published by the defendants, a reasonable man to whom the publication was made, would be likely to understand it in the libelous sense. The House of Lords in *Turner (Otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 held that it is unreasonable that when there are a number of good interpretations the only bad one should be seized upon to give defamatory sense to the words. This was adopted by the Court of Appeal in *Tony Pua Kiam Wee lwn. Syarikat Bekalan Air Selangor Sdn Bhd (Unreported)* Court of Civil Appeal W-02(NCVC)(W)-1464-06-2012.

**[105]** Be as it may, assuming the plaintiffs' pleading is found not to be defective, whether the impugned articles bear defamatory those words referred to the plaintiffs are specific words pleaded incompliance with *DDSA Pharmaceuticals Ltd v. Times Newspapers Ltd And Another*, again it is trite whether by those words the ordinary man, on reading those words in the context of the impugned articles, would understand them to carry the meanings alleged in para. 27(a) to (y) of the amended statement of claim can sustain.

**[106]** This court have to decide what meaning the words would have conveyed to an ordinary, reasonable person using his general knowledge and common sense. The test is an objective one: it is the natural and ordinary meaning as understood by an ordinary, reasonable person, not unduly suspicious or avid for scandal. See *Microsoft Corp v. SM Summit Holdings Ltd* [1999] 3 SLR(R) 465 at p. 493 and Price & Duodu, *"Defamation Law, Procedure & Practice*", para. 2.06.

**[107]** In *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors* [2003] 6 CLJ 559; [2003] 4 MLJ 96, it was held that:

> The test involved in determining whether or not the words complained of are defamatory is also a 2 stage process. Firstly, it must be considered what meaning the words would convey to an ordinary person. Once this has been established, secondly it must be considered whether under the circumstances in which the words were published, the reasonable man would be likely to understand them in a defamatory sense. The abstraction of the reasonable man was to create a balance between freedom of speech and the protection of reputation. The test of whether the words are capable of conveying a defamatory meaning is a question of law calling for a decision by the Court.

(See also *Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32, *Irene Fernandez v. Utusan Melayu (M) Sdn Bhd & Anor* [2008] 2 CLJ 814)

**[108]** The defendants did not dispute that the first defendant published an article (exh. "P5") written by the second defendant which reported that:

(a) DBKL had awarded a contract which made the plaintiffs rich;

(b) as profit oriented businesses, one could not blame the plaintiffs for accepting a rosy deal that would bring them in excess of RM 32 million for three years;

(c) the only issue is, it is public money that is going towards filling the pockets of those behind this venture;

(d) the quarrel was not so much with the businessmen, but what was running through the minds of the guardians of our coffers when they approved such extravagance for plants?

(e) thankfully the Mayor Tan Sri Ahmad Fuad was a civil servant who was willing to stand up to questionable decisions and abuse of public trust;

(f) the contract had been awarded without tender by the FT Ministry and not the DBKL;

(g) the Mayor deserved praise and should not be punished for doing right by the people;

(h) the Prime Minister should remove ministers who not only do not perform but also try to use their influence to gain favours for themselves and their minions;

(i) the Auditor General and/or the Malaysian Anti-Corruption Agency should investigate the RM32 million contract which was awarded without tender.

**[109]** The defamatory nature of an imputation also cannot be judged in isolation. It has to be ascertained by reference to the moral or social standards of society generally. This is an important part of the consideration of what constitutes defamatory matter. Such societal standards are not amenable to evidentiary proof. It will be up to the judges to consider the requisite standards when determining whether a matter is either capable of being defamatory or is in fact defamatory. (See *Dato' Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 5 CLJ 301; [2010] 2 MLJ 492 at pp. 503-504).

**[110]** The meaning of the impugned articles is not a question of evidence. It "is in essence a question of law that turns upon the construction of the words published ... " (See *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461, CA at p. 466 para. (f); "the natural and ordinary meaning must be

considered objectively without reference to evidence or what the plaintiff understood them to mean." (See *Lim Kit Siang v. Datuk Dr Ling Liong Sik & Ors* [1996] 1 LNS 106).

**[111]** View objectively on the reported words, my considered opinion is that the ordinary man, on reading those words in the context of the impugned articles, would understand that the impugned articles criticised government procurement procedures ie, the rationale and manner in which the 2006 contract was awarded. It did not criticise or discredit the plaintiffs; on the contrary the articles expressly exonerated them or by the words: "... one cannot blame them." and "... again, my quarrel is not so much with the businessmen would not understand them to carry the meanings alleged in para. 27(a) to (y) of the amended statement of claim.

**[112]** Applying the test in the above cited cases, it is my considered opinion that those words in impugned articles do not in their natural and ordinary sense carry the meanings pleaded by the plaintiffs in para. 27(a) to (y) of the amended statement of claim and are not defamatory of the plaintiffs.

**[113]** Even if I am wrong and assuming that the whole context of the impugned articles as alleged by the plaintiffs carry the meanings alleged in para. 27(a) to (y) of the amended statement of claim, the result is still the same that the ordinary man, on reading the whole context of the impugned articles, would understand that the impugned articles criticised government procurement procedures and that the whole words or context of the impugned articles do not in their natural and ordinary sense carry the meanings pleaded by the plaintiffs in para. 27(a) to (y) of the amended statement of claim and are not defamatory of the plaintiffs.

**[114]** In the impugned articles, the plaintiffs alleged that in essence of what the first defendant said are these:

(a) The RM32.4 million deal would have cost rate payers an unusually large amount of RM900,000 a month;

(b) The deal was for something completely unnecessary and extravagant for first in its nature - fresh flowers, second, in its use - to adorn entrances to the DBKL's building, officers of senior officials and that of the FT Ministers;

(c) It is not only extravagant but also tainted with something wrong- "part of the Mayor to right wrongs on questionable decisions";

(d) It was so extravagant that it was originally priced at RM1.5 million a month before it was negotiated downwards;

(e) It was extravagant in the climate obtaining at its inception, ie, 2006;

(f) This deal involved "abuse of the public trust" and "political masters" were behind this deal;

(g) This is clear when the first defendant asked the question "Or were they putting individual interest over public interest." The individual interest would be clearly the individual interest of the "political masters" referred to;

(h) "Political masters" toes would be stepped upon because they "awarded" the contract without a tender. The tender was "awarded" at the level of the Federal Territory and Urban Wellbeing Ministry forcing DBKL "to foot the bill";

(i) The "political masters" are "the vultures that have infiltrated public officers" and "have used their influence and power to gain favours for themselves and their minions". The favours "are none other than financial or other gratification";

(j) "The vultures" may also refer to the plaintiffs - businessman who have infiltrated public officers;

(k) It is important to remove these "vultures" because the Federal Territory and Urban Wellbeing Ministry under Raja Nong Chik's predecessor ran the city "like a Sendirian Berhad" - meaning for private gains and financial and other gratification; and

(l) This is why the first defendant wondered how the Auditor-General missed this deal and that the "Malaysian Anti-Corruption Agency be interested in this deal?"

**[115]** Reading the words in impugned articles in the context of meanings in para. 27(a) to (y) of the amended statement of claim, my view is that the articles do not accuse the plaintiffs of being involved in bribery or corruption. Indeed there is no suggestion of bribery, or that any civil servant was enriched, in any of the impugned articles.

**[116]** The impugned articles do state that the 2006 contract was awarded without tender. As admitted by PW1, the 2006 contract was in fact awarded without tender (see notes of proceedings, p. 114.) However, the natural and ordinary meaning of this is not that it was procured by the plaintiffs through bribery.

**[117]** It is true that the 2006 contract would have given the plaintiffs financial gain and profit. There is nothing defamatory about saying that the plaintiffs sought the 2006 contract to make profits. They are, after all, businessmen. Indeed, it would only be arguably defamatory if the impugned articles had suggested that the plaintiffs were such bad businessmen that they made losses on the 2006 contract.

**[118]** I agree that the impugned articles do not make any reference to any relationship of any sort between the plaintiffs and civil servants. In this regard, "political masters"/"ministers" are NOT civil servants. The term "civil servants" is loosely used by the plaintiffs in their amended statement of claim - none have been identified by the plaintiffs by name. It remains unclear who these alleged "civil servants" are or what is meant by the plaintiffs.

**[119]** I further agree with the defendants' submission that a better interpretation of the impugned articles, read as a whole, is that they question whether the decisions made by "political masters" were an "abuse of the public trust". However, the "political masters" in office in 2006 are not the plaintiffs. Accordingly, whether or not the impugned articles criticise "political masters" in office in 2006 is irrelevant to this action. What is clear is that the impugned articles do not suggest that the plaintiffs abused the public trust, or that the plaintiffs would cause action to be taken against DW1.

**[120]** On an allegation about bribery, the allegation is not that any ministers were enriched by the award of the 2006 contract. Rather, it is an allegation that some ministers use their influence and power to gain favours for themselves and their minions. It is not an allegation that by reason of the 2006 contract any minister made any personal profit. I agree that the paragraph in question is clearly a general comment about the need to control ministerial activities, rather than being about this contract specifically.

**[121]** On allegation that plaintiffs were an immoral business entity who cared only about profits without regard to the public interest, who had amassed illegal profits and wasted public funds. I agree that nowhere in the impugned articles does it state that the plaintiffs had amassed wealth or profits illegally or that the plaintiffs wasted public funds. Indeed it was not possible for the plaintiffs to waste public funds; that can only be done by the persons who spend public funds.

**[122]** The real question is whether the monies could have been used for better purposes instead of on flowers and plants. The criticism was against DBKL and not the plaintiffs. And this criticism was pursuant to an admission by the DBKL, through DW1, that the government had wasted its money on the 2006 contract. As to the profits made by the plaintiffs, reading the impugned articles as a whole, the defendants specifically and clearly says that the plaintiffs cannot be blamed for making profits from the 2006 contract.

**[123]** Plaintiffs' allegation that the natural and ordinary meaning of the impugned articles is that the plaintiffs committed a serious crime. My view is that the impugned articles never make such an allegation. The word "stink" is not defamatory. I agree with the defendants that it is a comment, not an allegation of facts. It is too farfetched to impute the word "stink" to any heavy crime or wrongdoing by the plaintiffs.

**[124]** The impugned articles do not contain such statements or comments that the plaintiffs misled the public and 'ratepayers' and were not qualified.

**[125]** It was alleged that the impugned articles had implied that the 2006 contract was terminated, cancelled or prematurely revoked because of the plaintiffs' breach. I find no suggestion in the impugned articles that the 2006 contract was terminated for breach. Incidentally, the word "revoked" was used correctly by DW2 in the impugned articles. It was reporting what DW1 said. DW1 confirmed that he had in fact used that word. It cannot be an issue because PW1 himself used the word "revoke" or "terminate" to describe what happened to the 2006 contract in contemporaneous correspondence to the authorities in exh. "P17" and exh. "D27", PW1 used the words "memberhentikan kerja-kerja kontrak penanaman bunga", penamatan kontrak DBKL and "penamatan kontrak".

**[126]** The alleged sting is that the natural and ordinary meaning of the impugned articles were the existence of a conspiracy between the plaintiffs DBKL or Federal Territory Ministry officials to misuse public funds. I find the impugned articles never suggested any conspiracy to misuse public funds, nor can they be so interpreted.

**[127]** I accepted that the second defendant may erred in the number of locations that the flowers and plants were supplied to (18 locations), however in my opinion it does not change the fact that it was only for a few areas and not for the whole city of Kuala Lumpur. Having regard to the facts and matters proved at trial, this is not a material error.

**[128]** Finally it was alleged that the impugned articles had implied that the plaintiffs' business/business concept was unprofitable and DBKL or its customers received no benefit. I agree with the defendants that this is misconceived. The impugned articles do not contain such statements. The plaintiffs' business is not the focus of the impugned articles.

**[129]** It is not disputed that there are also other words as reported such as "one could not blame the plaintiffs", "the quarrel was not so much with the businessmen" and "auditor general and/or the MACC should investigate the RM32 million contract which was awarded without tender" in the impugned articles. The law is that one cannot pick and choose parts of the publication and claim they are defamatory. This is because there could be other passages or words mentioned in the articles have taken away the 'sting' (*Soh Chun Seng v. CTOS - EMR Sdn Bhd* [2004] 5 CLJ 46 at p. 53).

**[130]** The alleged sting in the plaintiffs' mind is that the natural and ordinary meaning of the impugned articles was the existence of a conspiracy between the plaintiffs' DBKL or Federal Territory Ministry officials to misuse public funds. The words that plaintiffs should not be blamed for

obtaining this contract in my view rather it criticises "the guardians of our coffers when they approved such extravagance for plants". Had the gist of the article been about bribery, the impugned articles would have criticised the Plaintiffs as well, since both the giver and the taker are to be blamed in bribery. In short, the impugned articles would not have gone out of their way to expressly exonerate the plaintiffs by the words: "One cannot blame them."

**[131]** Thus, the impugned articles are not defamatory of the plaintiffs. They are an attack on government priorities in expenditure, and government procurement procedures.

**[132]** I agree with the defendants that in this regard, alleging that a person is being investigated, or calling for an investigation into someone, are not an allegation that the person is guilty of a crime, and is therefore not defamatory.

**[133]** In *Dato Annas Khatib Jaafar v. Datuk Manja Ismail & Ors* [2011] 1 LNS 167; [2011] 8 MLJ 747, HC, Prasad Abraham JC (as he then was) held:

> [7] The alleged defamatory sting to the impugned article which essentially are allegations being made to enable the same to be fully investigated is confined to that and no more. See *Sivabalan a/l P Asapathy v. New Straits Times Press (M) Sdn Bhd* [2010] 9 MLJ 320; [2010] 7 CLJ 885 the decision of His Lordship Mohd Zawawi Salleh J where he held:
>
> > (1) The news report merely makes an allegation of rape, among others, against the plaintiff as opposed to saying that the plaintiff is guilty of rape and several other allegations. Thus, the 'sting' of the news report is that the plaintiff is merely suspected of alleged to have committed the acts referred to and that the police have detained him for investigations. Further, the plaintiff's witness SP1 and SP2, agreed during cross, examination that when read as a whole and in its context, the news report merely contained allegations against the plaintiff rather than factual statements imputing guilt on the plaintiff. Therefore, the words complained of in the news report are not defamatory of the plaintiff. The plaintiff has failed to establish the first element required in order to maintain a cause of action in defamation.

**[134]** In *Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd* [2010] 7 CLJ 885, the court held that the words complained of there were not defamatory of the plaintiffs. The impugned news report in *Sivabalan*'s case is set out in pp. 889 to 890 of the case report. In construing the said impugned news report, the court held as follows:

> (1) the news report merely makes an allegation of rape, among others, against the plaintiff as opposed to saying that the plaintiff is guilty of rape and several other allegations. Thus, the 'sting' of the news report is that the plaintiff is merely suspected of [*sic*] alleged to have committed the acts

referred to and the police have detained him for investigations. Further, the plaintiff's witnesses SP1 and SP2, agreed during cross-examination that when read as a whole and in its context, the news report merely contained allegations against the plaintiff rather than factual statements imputing guilt on the plaintiff. Therefore, the words complained of in the news report are not defamatory of the plaintiff. The plaintiff has failed to establish the 1stelement required in order to maintain a cause of action in defamation.

**[135]** The same principles applied in the case of *Tan Sri Dato' Tan Kok Ping, JP lwn. The New Straits Times Press (Malaysia) Bhd & Yang Lain* [2010] 3 CLJ 614. The case concerns two news reports published by the first defendant in 'The New Straits Times' entitled 'Magnum Executive Chairman Questioned in Bukit Aman' and another in 'The Malay Mail' entitled 'Magnum Boss under Probe'. These news reports concern allegations that the plaintiff had committed forgery, and police investigations on the plaintiff on suspicion of having committed cheating and forgery. The plaintiff claimed that the news reports were defamatory of him. The plaintiff claimed that they conveyed the meaning that he had forged or participated in forging certain documents. The defendants denied that the news report carried the defamatory meanings alleged by the plaintiff and reliance was also placed on the defence of qualified privilege (which same defence is also relied on in this instant case).

**[136]** The High Court in dismissing the plaintiff's claim for defamation held that:

(i) The news reports must be read in their context and as a whole, and must be given its natural and ordinary meaning and not construed in detail and by way of inference.

(ii) The plaintiff's solicitor's submissions that news readers will form the view that the plaintiff was guilty of forging or participating in the forging of the document concerned was far from being a fact and went outside the actual context of what was reported.

(iii) The court agreed that news readers will not form the conclusion that the plaintiff was guilty purely on the basis that he had been called for police investigations and have his statement recorded.

(iv) The court was satisfied that the news report reported on a matter which actually transpired, in that police investigations did take place and that investigations alone did not mean that the plaintiff was guilty.

**[137]** The words used in the newspaper reports in the above cases in my view are more direct then the impugned articles in this case. Applying the above principles in the cases referred to above, it is my considered opinion

that the impugned articles in the instant case are not defamatory of the plaintiffs. The impugned articles read together and viewed objectively, an ordinary, reasonable person using his general knowledge and common sense would understand and/or come to a conclusion the impugned articles:

(a) criticised the expenditure of RM32.4 million on flowers and plants;

(b) criticised the awarding of contracts without tender;

(c) called for investigations into the procurement procedures; and

(d) praised the Mayor for his decision in revoking this contract.

**[138]** I am minded that in this era of increased transparency, calling for an investigation is not capable of being interpreted as an allegation that there has in fact been wrong-doing. In 2004, Azmel J (as His Lordship then was) in *Hussin Mohd Ali v. Ho Kay Tat & Anor* [2004] 2 CLJ 407 at p. 415; [2004] 3 MLJ 140, HC said at paras 28, p. 148:

> It is also important that such defects should not be swept under the carpet. Hence the role of the newspaper and the press become very important to publicize whatever defects and shortcomings that occurred during such events in order to give public awareness and at the same time to urge SIC to rectify such defects and shortcomings.

In 2008, Hamid Sultan JC (as he then was) held:

> I do not think the words complained of can be construed as defamatory in this time and era where public perception to accountability, transparency, good governance in respect of people holding office, or position, or who get involved in the affairs of organisation such as associations has become more and more, a subject matter of critical scrutiny by the public or by those who are associated with it.
>
> As I said earlier, definition of defamation is not a static concept. It must meet with the revolutionary thoughts of men from time to time as the test is objective. Now the focus being transparency, accountability, good governance etc. Thus, purely objecting to criticism by filling suits for defamation that too in millions of ringgit when issues of transparency, accountability and good governance is the focal point of the attack, does not promote constitutional rights to freedom of speech. I take the view that the courts now will be reluctant to entertain them, unless the attacks are in the nature which has no nexus and/or is not inextricably interwoven to the concept of transparency, accountability and corporate governance, and such acts are done with malice purely to assassinate the character of the individual personally and destroy his family, quality of life and privacy.

(See *Chew Peng Cheng v. Anthony Teo Tiao Gin* [2008] 8 CLJ 418 at pp. 441-442; [2008] 5 MLJ 577 at pp. 600 - 601).

**[139]** I have considered the submissions from the plaintiffs' and defendants' counsel and it is my considered opinion that the impugned articles (exh. "P3", exh. "P4" and exh. "P5") are not defamatory of the plaintiffs *per se* as well as in the circumstances of this case. The plaintiffs have failed to show otherwise. Accordingly, the plaintiffs have failed to establish the first element required in order to maintain a cause of action in defamation.

**[140]** The plaintiffs have failed to meet the legal and procedural requirement set out in *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; 1 CLJ (Rep) 321; [1989] MLJ 315. It is trite law that if the plaintiffs fails to prove one of the above elements, then the plaintiffs' claim can be dismissed without the defendants adducing any evidence (*S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173 and *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 1 LNS 5: [1966] 2 MLJ 66).

**[141]** In the circumstances, the plaintiffs' claim is hereby dismissed with costs of RM30,000.